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No. 85-2107

In The
Supreme Court of the United States
October Term, 1986

AMOCO OIL CO,

Petitioner,

v

JIM HEILIG OIL & GAS, INC; HARMER OIL,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the separate judgment requirement of Federal Rule of Civil Procedure 58 was waived by the parties in treating the Opinion and Order of the District Court as the final Judgment for all purposes on appeal.

II. Whether Petitioner can rely on the separate Judgment requirement to excuse its erroneous assumption that a Motion to Reconsider tolls the time limits for filing a Notice of Appeal to the Circuit Court.

DISCLOSURE OF CORPORATE AFFILIATIONS

Pursuant to Sup. Ct. R. 28.1, Respondent Harmer Oil, Inc. makes the following disclosure:

Respondent, Harmer Oil, Inc. was a Michigan Corporation and wholly owned by Jack T. Harmer. It had no subsidiaries or affiliates, and has been dissolved with all assets transferred to Mr. Harmer.

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FEDERAL PROCEDURAL RULES INVOLVED

Federal Rules of Civil Procedure, Rule 58

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Federal Bankruptcy Rules, Rule 8015

> Unless the district court of the bankruptcy appellate panel by local rule or by court order otherwise provides, a motion for rehearing may be filed within 10 days after entry of a judgment of the district court or the bankruptcy appellate panel.

Federal Rules of Appellate Procedure, Rule 4(a)(1)

> In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from; but if the United States or an officer

or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

COUNTER-STATEMENT OF THE CASE

Petitioner's statement of the case is in error to the extent it states the Court of Appeals contended the Motion for Reconsideration did not toll the appeal period as not filed within 10 days of the May 21, 1985 Order. Neither in the Order to Show cause nor in any other pleadings did the Circuit Court make that claim. The record does not reflect why the Circuit Court held the Motion to Reconsider did not toll the appeals period, but Petitioner has not challenged the Circuit Court's position that no tolling occurred.

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SUMMARY OF ARGUMENT

Petitioner considered the May 21, 1985, Order of the District Court as the final Judgment for purposes of appeal and as commencing the 30 day appeals period. It either deliberately disregarded or was completely unconcerned with the separate Judgment requirements of Rule 58 and was willing to, and did proceed with the appeal as if Rule 58 was satisfied or did not apply. If the appeal had been timely

filed the provisions of Rule 58 would, therefore, have been considered waived, and the Circuit Court would have decided the merits of the case. However, due to Petitioner's misunderstanding of the effect of a Motion to Reconsider on the 30 day filing period, its appeal was untimely. Petitioner now argues that it did not intend to waive the requirements of Rule 58, and by reliance thereof can avoid the results of its own ignorance. However, the requirement of a separate Judgment can be and has been waived in this case, and is not available as an excuse for Petitioner's untimely appeal.

———o———

ARGUMENT

Federal Rule of Appellate Procedure 4(a)(1) provides that a Claim of Appeal must be filed within 30 days from the date of entry of the Judgment or Order appealed from, and Rule 58 of the Federal Rules of Civil Procedure provides that a Judgment shall be set forth on a separate document. It is undisputed that no separate "Judgment" was ever entered by the District Court after ruling on the appeal from the Bankruptcy Court. However, Petitioner considered the May 21, 1985 Memorandum Opinion and Order of the District Court as the final Judgment for purposes of appeal and as commencing the 30 day appeal period. This is clearly shown by the July 24, 1985 Notice of Appeal, wherein Petitioner expressly claimed an appeal from that Order. At no time before the Sixth Circuit, or in its Petition for Writ of Certiorari has Petitioner made any claim that it misunderstood the time requirements for filing an appeal because of the lack of entry of a formal Judgment.

Petitioner's error, however, was its mistaken belief that a Motion for Reconsideration, if filed within the 30 day appeals period, would toll the time for filing an appeal until that Motion was decided. However, the Sixth Circuit has ruled that even if a Motion for Reconsideration could toll the time for filing an appeal it must be filed within 10 days to do so. *Peake v First Nat'l Bank & Trust Co of Marquette,* 717 F2d 1016 (6th Cir 1983). Further, Rule 8015 of the Federal Rules of Bankruptcy Procedure, which controls as this case originated in Bankruptcy Court, also has a 10 day limitation on filing a Motion for Rehearing of an appeal of a bankruptcy judge's decision to the District Court. The Advisory Committee Note to that Rule expressly states that

> "The filing of a motion for rehearing does not toll the time for taking an appeal to the court of appeals from the district court or the bankruptcy appellate panel."

Therefore, whether considered as an ordinary case originating in district court, or as a bankruptcy appeal, the result is still the same, the Motion for Reconsideration did not toll or otherwise extend the time for appeal to the Circuit Court. When this came to the attention of the Sixth Circuit it issued an Order to Show Cause why the appeal should not be dismissed. In response Petitioner for the first time claimed that no separate Judgment had been entered, and therefore, the appeal was not untimely, but rather premature. Respondent submits that Petitioner cannot rely on this defense to excuse its own clear error, and having previously decided to treat the District Court's Order as a final Judgment for all purposes on appeal must abide by the results of that decision.

In *Banker's Trust Co v Samuel Mallis,* 435 US 381, 98 S Ct 1117, 55 L Ed 2d 357 (1978), this Court held that the

filing of a separate and distinct Judgment under Rule 58 of the Federal Rule of Civil Procedure is not a prerequisite for jurisdiction in the Court of Appeals. The Court stated that the separate document requirement was intended

> "to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court only to have the appellate court announce later that an early document or entry had been the judgment and dismissed the appeal as untimely. 435 US at 385.

Further, the Court stated that a common sense application of Rule 58 should be applied, and the technical requirements for a Notice of Appeal were not mandatory if this did not mislead or prejudice any party. *Bankers Trust Co v Mallis, supra,* 435 US at 387.

In this case the appeal was not dismissed because Petitioner was unaware that a prior Order was the final Judgment of the District Court. Further, Petitioner was not misled, or prejudiced by the failure of the Court to enter a separate Judgment. Rule 58, therefore, did not cause, and had nothing to do with the dismissal of the appeal, except as a belated attempt by Petitioner to escape the results of its own negligence.

Petitioner has argued that it did not "waive" the requirements of Rule 58. However, the basis for that claim appears to be Petitioner's ignorance. Until forced to find some answer to the Order to Show Cause Petitioner apparently was unaware of the provisions of that Rule or of the District Court's noncompliance therewith. Yet, knowledge is not required for this waiver. If one is aware that a separate Rule 58 Judgment has not been entered

he will see to its entry rather than risk having his appeal challenged and dismissed as premature. It is only where one is unaware that the requirements of Rule 58 have not been satisfied that one would appeal before a judgment is entered.

Moreover, Petitioner's own actions belies its argument that no waiver was made. Either with knowledge of, or total disregard for the absence of a Rule 58 Judgment, it filed an appeal, briefed the same, and would have had the Circuit Court decide the merits of the case. That action, if timely done, would have constituted a waiver of the separate Judgment requirement and if Petitioner's appeal had been challenged as premature it undoubtedly would have argued that it had "intended" to waive any procedural impediment to commencement of the appeals period. There is no reason in law or equity why a waiver should be found in that case but cannot be found here. In *Bankers Trust Co v Mallis*, supra, a waiver was found from the actions of the parties in treating the District Court's Order as if it were a separate final Judgment for purposes of appeal, and those same circumstances exist in this case.

In summary, Petitioner's appeal was untimely filed because of its assumption that a Motion for Reconsideration tolled the appeals period. In an attempt to escape the results of its failure to examine the Rules and case laws on this issue, Petitioner tried to hide behind the requirements of Rule 58, which it had implicitly waived and completely ignored until that time. However, all parties, including Petitioner, having treated the May 21, 1985 Order as the final Judgment of the Court for purposes of

appeal, the requirements of Rule 58 were waived, and Petitioner cannot rely thereon as justification for its own negligence.

CONCLUSION

WHEREFORE, on the basis of the foregoing, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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